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No. 84-1601

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AETNA LIFE INSURANCE CO.,
Appellant,

v.

MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.,
Appellees.

On Appeal From the Supreme Court of Alabama

REPLY MEMORANDUM

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MISCELLANEOUS:

American Banker, May 10, 1985, at 1, col. 3 10

REPLY MEMORANDUM

Because appellees' Motion to Dismiss (hereafter "Motion") advances arguments which were generally anticipated in appellant's Jurisdictional Statement (hereafter "Juris. Stat."), this Reply Memorandum will respond primarily to various mischaracterizations by appellees of fact, law, and appellant's position in this appeal.[1]

I. JURISDICTION

Appellees' arguments regarding this Court's jurisdiction to decide this case proceed from the inaccurate assumption that "[i]t is a fundamental prerequisite of this Court's jurisdiction over a decision from a state court that the issues sought [sic] under federal law have been presented to *and* decided by the highest state court." Motion, at 4

[1] Although the selected "facts" recited by appellees, Motion, at 1-3, on which the Alabama courts assertedly "based their decisions," Motion, at 1, are essentially irrelevant to the constitutional questions presented by this appeal and serve only to focus attention away from the legal issues, four observations are in order regarding their presentation by appellees. First, they are "findings" made not by the jury or trier of fact, but are summaries of selected evidence authored by the Justice of the Supreme Court of Alabama whose bias and personal interest in the outcome of this case is challenged by appellant. Second, if appellees' assertion were true that these "facts" "represent the unanimous holding of the Supreme Court of Alabama," *id.*, at n.1, because not disputed by the four dissenting Justices of that court, then presumably those four Justices dissented on the basis that the majority had rewritten the Alabama *law* of bad faith failure to pay an insurance claim. Third, appellees' statement of the facts conveniently ignores the undeniable fact that appellee Margaret W. Lavoie was hospitalized a total of twenty-three days, but received a discharge diagnosis of "osteoarthritis, mild psychophysiologic reaction manifested by abdominal pain." App. A, at 4a. Fourth, appellees seem to embrace the apparent position of the majority of the court below that the $3,500,000 punitive damage award can be sustained by the manner in which this case was presented to the jury. Motion, at 3. This position, if nothing else, demonstrates the essentially irrational nature of punitive damages that is challenged in Question 4 of this appeal.

(emphasis added). For this erroneous proposition appellees rely, *inter alia*, on this Court's decision in *Illinois* v. *Gates*, 462 U.S. 213 (1983). But, as previously pointed out by appellant, Juris. Stat., at 8, this Court restated in *Illinois* v. *Gates*, 462 U.S., at 218 n.1, the familiar rule that a federal question must have been "*either* raised or squarely considered and resolved in state court." Application of this Court's rule, rather than the standard created by appellees, establishes this Court's jurisdiction over this appeal.

A. Presentation of the Disqualification Question

Appellees argue that the issue of Justice Embry's misconduct may not be reached by this Court because appellant did not discover the underlying facts and raise its federal constitutional challenge sooner. They state that appellant "made no effort to establish why it could not have discovered the relevant facts before more than a year had passed since the filing of the two suits by Justice Embry." Motion, at 13. Appellees do not, however, suggest what actions appellant could or should have taken to "discover" the facts establishing Justice Embry's constitutional unfitness to decide this case. Surely appellees cannot be urging a rule whereby, in order to preserve a possible constitutional challenge, litigants must probe into the private lives of the jurists before whom they appear to discover interests which may cause a judge to be biased or which may create the strong appearance of bias. Nor do appellees explain what justification there might have been for Justice Embry's not making this obvious conflict known to the parties or to his fellow Justices who had been made putative members of the class in his bad faith action against Blue Cross. Appellees implicitly urge a rule under which litigants would be under a continuing duty to monitor the dockets of every court in a state in order to identify litigation brought by judges before whom they appear which might disqualify a judge from hearing their cases. Appellees also conveniently ignore the fact that very damaging evidence of Justice Embry's misconduct is contained in his deposition, which

was not even in existence until January 10, 1985 and which, despite its best efforts, appellant was unable to secure until March 20, 1985.[2]

Finally, appellees seem to argue that appellant had a duty to "suggest" in its initial disqualification motion "what procedure the Alabama court should follow in deciding whether its members were disqualified." Motion, at 11-12. The source of this duty or its ramifications are not revealed and appellees' point, if they have one, is obscure. Appellant squarely placed this issue before the Supreme Court of Alabama and demanded that Justice Embry and any members of his putative class be disqualified and this case reheard. In support of its March 22, 1985 disqualification motion, appellant specifically objected to the decision of each Justice below (save Justice Embry) in refusing to pass on Justice Embry's constitutional qualifications to hear and decide appellant's case. App. G, at 274a-275a. Appellant could have done no more.

B. Presentation of the § 12-22-72 Question

The total lack of any clear, consistent rule of practice in the Supreme Court of Alabama as to when it will or will not decide a question not previously presented is illustrated by appellees' statement, supported by citation to a single case of the court below, *Kirkland* v. *Kirkland,* 281 Ala. 42, 198 So.2d 771 (1967), Motion, at 6, that "Alabama procedure does not permit parties to raise new questions on rehearing . . . ," as contrasted with the actual practice of that court with respect to entertaining *new* questions expressly involving interpretation of § 12-22-72 in no fewer than seven-

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[2] Appellees state that appellant "did not offer any explanation of the circumstances of its discovery" of Justice Embry's misconduct. Motion, at 13. In fact, appellant fully explained those circumstances in three affidavits filed in connection with its February 21, 1985 disqualification motion, App. F, at 105a-107a, 130a-131a, and two additional affidavits and one exhibit detailing its efforts to secure the transcript of Justice Embry's deposition, App. G, at 137a-144a.

teen cases dating from 1861 [3] on applications for rehearing or their procedural equivalents.

It must be emphasized that § 12-22-72 imposes a liability at the time the judgment below is affirmed. An appellant has no liability for the penalty before affirmance. No case in the Supreme Court of Alabama of which we are aware so much as suggests that any question involving §12-22-72 is not timely presented in an application for rehearing, and appellees point to none.

In addition, a careful reading of the opinion in *Kirkland*, the case relied upon by appellees, shows that in that case the court rendered its opinion on the question presented for the first time in that application notwithstanding the disclaimer that it could not do so. 281 Ala., at 49, 198 So.2d, at 777. This obvious gap between rhetoric and practice is illustrated once again by the court's decision in *Ex parte Hanna*, 267 Ala. 527, 103 So.2d 720 (1958), a case relied upon by appellant, Juris. Stat., at 15. In that case, the petitioners sought to challenge the constitutionality of two statutes and the respondent contended that the challenge was improperly raised. Rather than rejecting those challenges as untimely, the court reached and decided the constitutionality of one of those statutes. Appellees explain the basis for the *Hanna* court's decision by reasoning that, "since the appellant's constitutional argument was plainly without merit, the [Supreme Court of Alabama] found that it did not have to reach the procedural issue." Appellees apparently by this reasoning would try to convince this

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[3] Subsequent to docketing this appeal, appellant discovered a case, in addition to the sixteen cases previously documented, Juris. Stat., at 12-13 & n.5, in which the court below heard and determined a challenge to the interpretation of a predecessor of § 12-22-72 which was not even raised in an application for rehearing but was raised for the first time in the trial court after remand by the Supreme Court of Alabama. *Lawrence* v. *Jones*, 37 Ala. 388 (1861). Appellees' argument that some of these cases may be distinguished, Motion, at 8-9, because they involve questions regarding § 12-22-72 which were raised by appellees rather than appellants is a distinction without any significance as to when a party must raise questions concerning § 12-22-72 in order to be heard.

Court that the rule in Alabama is that frivolous federal constitutional questions may be presented at any time and will be decided, but substantial federal constitutional questions are strictly governed by an unarticulated procedure under which they will not be decided.

Appellees' attempt to dismiss *King* v. *Reid*, 428 So.2d 611 (Ala. 1983), is misleading. Appellees quote from *King*, Motion, at 7, the disclaimer—already brought to the attention of this Court by appellant, Juris. Stat., at 15—found in *King* and some other cases of the court below that it will not decide issues which have not been presented to the lower state courts. Appellees fail to quote the preceding sentence in *King:*

> "*Ransom v. Ransom*, Ala., 401 So.2d 746 (1981), and a casual reading of the present language of § 6-10-60, et seq., dispose of the attack on those statutes."

Id., at 615. Because the Supreme Court of Alabama is without power to issue advisory opinions, *e.g.*, *Opinion of the Justices No. 304*, 436 So.2d 832, 833 (Ala. 1983), the *holding* of *King* v. *Reid* is necessarily found in the sentence quoted above. The rule in the Supreme Court of Alabama on this issue is plainly that it has no rule,[4] or at least that it has no rule that is susceptible to being invoked against appellant in this case.

C. Presentation of the Contract Clause Question

Appellees concede, Motion, at 15 n.14, that "this Court's decisions leave . . . in doubt" the question whether the mode

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[4] The case of *Orr* v. *Orr*, 440 U.S. 268 (1979), relied upon by appellees, Motion, at 10, is another case illustrative of the actual practice of the court below. And this Court, in taking jurisdiction over and vacating the decision of the court below in *Hughes* v. *Hughes*, 362 So.2d 910 (Ala. Civ. App.), *writ dismissed*, 362 So.2d 918 (Ala. 1978), *vacated*, 441 U.S. 901 (1979), necessarily decided that the court below had no consistent practice because the Court of Civil Appeals had *expressly* refused to decide the constitutional question presented to it because that question had not been presented to the lower court, *Hughes* v. *Hughes*, 362 So.2d, at 916, and the Supreme Court of Alabama had dismissed a petition for a writ of certiorari without disturbing that holding of the Court of Civil Appeals.

of presentation of a federal question to the state courts raises jurisdictional or only prudential concerns. This concession, of course, does not go far enough. Until this Court repudiates its *power* to decide federal questions which were at *no* time presented to the state courts below or even to this Court, *see, e.g., Vachon* v. *New Hampshire,* 414 U.S. 478 (1974), the only permissible reading of this Court's cases is that the presentation of federal questions to the state courts raises only prudential concerns where at least one properly presented or decided federal question confers jurisdiction over the case before the Court.

D. Presentation of the Excessive Fine Clause and Due Process Clause Question

Appellant has argued that it was justifiably surprised by the affirmance of the judgment by the court below so as to entitle it to raise the doctrine of "surprise" established in cases such as *Brinkerhoff-Faris Trust Co.* v. *Hill,* 281 U.S. 673 (1930). Juris. Stat., at 16. Surely the five-to-four affirmance of the judgment below based on the highly interested vote of Justice Embry in an opinion overturning or substantially modifying pertinent Alabama law constitutes the requisite "surprise" for purposes of presentation of this question (and the Contract Clause question) for decision by this Court. If not, the *Brinkerhoff-Faris* doctrine can have little or no practical application.

II. THE SUBSTANTIALITY OF THE FOUR QUESTIONS

A. The § 12-22-72 Question

Appellees' defense of the constitutionality of § 12-22-72 seems to be based primarily on their suggestion that *Lindsey* v. *Normet,* 405 U.S. 56 (1972), is distinguishable because the Oregon statute struck down in *Lindsey* "placed an impediment on a group—tenants—which was the least likely to be able to meet it." Motion, at 19. Appellees' argument would necessarily require *Lindsey* to be read as establishing "tenants" as a suspect class for purposes of the Equal Protection Clause. The *Lindsey* Court, of course, did

no such thing. The discriminatory, overly broad and arbitrary barrier to access to the courts is the evil condemned in *Lindsey,* Juris. Stat., at 20, and is precisely the character of the penalty to which appellant objects.

In addition, and contrary to appellees' assertion that appellant "has not argued that section 12-22-72 is improperly duplicative of other protections created by Alabama . . . ," Motion, at 20, appellant expressly argued, Juris. Stat., at 19 n.9, that the ability of successful appellees to recover costs *and damages* on appeal under Rule 39, Ala. R. App. P., accentuates the irrational arbitrariness of § 12-22-72. The fact that apparently only two of the fifty States impose such a *mandatory* penalty on defendant-appellants is substantial evidence of the lack of any legitimate state purpose behind § 12-22-72.

B. The Disqualification Question

Appellees' argument that Justice Embry's having voted "in favor of the insurer," Motion, at 21, in nine cases decided by the court below during the pendency of his own bad faith litigation is both irrelevant and misleading. The argument is irrelevant because appellant's contention is that the identity between this case and Justice Embry's own civil actions, coupled with his extraordinary admissions in his deposition, are sufficient, in and of themselves, to require his disqualification under the Due Process Clause. The argument is misleading because, of the cases cited by appellees, none involved a partial payment and, indeed, the only three cases involving the "directed verdict" issue strongly reaffirmed, by a wide margin, the rule announced in *National Savings Life Insurance Co.* v. *Dutton,* 419 So.2d 1357 (Ala. 1982),[5] only serving to accentuate that the five-to-four decision in this case constituted a reversal of those two rules and that it could not have been

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[5] *See Payne* v. *Nationwide Mutual Insurance Co.,* 456 So.2d 34 (Ala. 1984); *Armstrong* v. *Life Insurance Co. of Virginia,* 454 So.2d 1377 (1984); *National Security Fire & Casualty Co.* v. *Vintson,* 454 So.2d 942 (Ala. 1984).

anticipated by appellant. Appellees avoid discussion of the facts related to Justice Embry's conduct because those facts cannot be denied, the conduct cannot be defended, and the circumstances command the result urged by appellant.

The importance of this Court's addressing this question goes well beyond the facts of this case. In an increasingly litigious society in which the rewards of prosecuting a lawsuit can be great—as illustrated by this case, it may be expected that jurists, like other citizens, will seek their day in court. This Court should make clear that judges may not participate in the decision of cases raising the same issues involved in litigation to which they are parties. This Court should also make clear that appellate judges may not abdicate their obligation to pass on the qualifications of their colleagues when it becomes necessary to resolve a substantial federal constitutional challenge presented by a litigant.

C. The Contract Clause Question

Appellees argue both that "the application of the Contract Clause [appellant] espouses is unprecedented . . . ," Motion, at 13-14 n.11, and that "there can be no doubt that the actions of Alabama's courts are not within the ambit of the Contract Clause" based on prior precedents in this Court, *id.*, at 23. Appellees cannot have it both ways; an argument never before advanced or considered by this Court is not likely to be expressly precluded by this Court's prior decisions. The question whether state action escapes scrutiny under the Contract Clause simply because it was taken by one branch of state government rather than by another branch is assuredly a substantial question. In addition, appellees' argument that the bad faith tort, clearly and emphatically recognized for the first time in 1981, imposes no new obligations on the contract involved in this case ignores the fact that but for the creation of that tort and appellant's contractual relationship with appellees, appellant would not be before this Court in this case. The liability for bad faith arises out of an evaluation of the manner in which the contract was performed, and must be viewed as a burden on that contract.

D. The Excessive Fine Clause and Due Process Clause Question

The substantiality of the questions surrounding the punitive damage award has been demonstrated once again in the affirmance by the court below of a punitive damage award of $3,000,000 in the case of *American Pioneer Life Insurance Co.* v. *Sandlin*, No. 82-1063 (Ala. Apr. 12, 1985).[6] In that case, unlike here, the defendant's conduct was actually submitted to the jury on fraud and conspiracy theories. The one Justice who concurred specially in that decision stated that he did so because he could not "conscientiously say that this verdict is more shocking than others this Court has approved." Slip op., at 21 (Maddox, J., concurring specially). This statement suggests that all semblance of control over excessive punitive damage awards by the court below has evaporated, leaving appellant and others similarly situated with nothing more than the protections of the Constitution.

Also, contrary to appellees' argument, Motion, at 26, this question is not foreclosed by this Court's decision in *Ingraham* v. *Wright*, 430 U.S. 651 (1977). Assuming, *arguendo*, that appellant got all the constitutional procedural process it was due in the courts of Alabama in this case, then the "formal adjudication of guilt" has occurred and the constitutionality of the punishment may be addressed by this Court. *Id.*, at 671-72 n.40.

The incongruity of the results which would follow from appellees' Eighth Amendment theories is illustrated by the events of April 30, 1985. On that day, a major national securities brokerage firm entered a plea of guilty to 2,000 counts of violating 18 U.S.C. §§ 1341 & 1343, felony counts for which that company agreed to pay a fine of $2,000,000 plus $750,000 for costs of the investigation and prosecution.[7] This scheme is reported to have involved some $10

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[6] For the convenience of the Court, appellant is lodging ten copies of the opinion in this case with the Clerk simultaneously with the filing of this Reply Memorandum.

[7] *United States* v. *E. F. Hutton Group, Inc.*, Crim. No. 85-00083 (M.D. Pa. Apr. 30, 1985) (Notice of Plea Agreement and Plea Agreement).

billion in illegal "check-rigging" by the defendant.[8] If appellees' theories are correct, a company found guilty of such offenses after a trial in which it enjoyed all the constitutional benefits afforded criminal defendants and upon which a similar punishment was imposed would have the right to challenge the fine under the Excessive Fine Clause. Appellant, on the other hand, after civil trial without the protections afforded the criminal defendant, having been found "guilty" of no more than failure to pay a $1650.22 insurance claim, would have no protection under the Excessive Fine Clause from the $3,500,000 punitive damage award. The fact is that the penalty imposed on appellant is an excessive fine under any rational standard and it should and does make no difference for purposes of the Excessive Fine Clause that it was imposed *without* the due process protections afforded a criminal defendant.

Respectfully submitted,

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May 14, 1985

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[8] *American Banker*, May 10, 1985, at 1, col. 3.